LIBRARY
SUPREME COURT, U.S.
24634
No. 914
Acquired
JEROME J. LONDIN
APR 11 1958
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

— v —

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR UNITED STATES AND APPENDIX

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for the United States of America.

JEROME J. LONDIN,
ROBERT B. FISKE, JR.,
Assistant United States Attorneys,
Of Counsel.

INDEX TO BRIEF

PAGE

Statement 1

Statutes Involved 3

Introduction to the Facts 7

The Facts 8

POINT 1—Gernie's role as the source of the heroin was conclusively established by the detailed observations of six agents, his possession of marked money, and his false disclaimer of knowledge of the automobile used in heroin transactions 15

POINT 2—The Government's inability to produce a minor informer long known to the defense did not entitle Ogull to ask irrelevant and immaterial questions 19

POINT 3—The Government had no knowledge that Harell would invoke the Fifth Amendment. Accordingly, there was no error in calling him as a witness. Any prejudice to Gernie was cured by the instructions to the jury 23

POINT 4—The Trial Court properly left Ogull's defense of entrapment to the jury 27

POINT 5—Ogull's motion for a mistrial because of testimony relating to a gambling enterprise of Buzzeo's was properly denied 31

PAGE

Point 6—The Trial Court did not err in refusing to strike testimony that Gernie had in his possession a marked bill more than two months after it had been paid over to Buzzeo 32

Point 7—The Trial Court correctly charged the jury as to the rule *falsus in uno, falsus in omnibus*... 35

Conclusion 36

Cases Cited

Di Carlo v. *United States*, 6 F. 2d 364 (2d Cir. 1925) 18

Lee v. *United States*, 245 F. 2d 322 (9th Cir. 1957) .. 33

Raviara v. *United States*, 353 U. S. 53 (1957) 20

Sorrells v. *United States*, 287 U. S. 435 (1932) 27

Sorrentino v. *United States*, 163 F. 2d 627 (9th Cir. 1947) 20

Trice v. *United States*, 211 F. 2d 513 (9th Cir.), *cert. denied*, 348 U. S. 900 (1954) 27

United States v. *Abdallah*, 149 F. 2d 219 (2d Cir.), *cert. denied*, 326 U. S. 724 (1945) 28

United States v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (2d Cir.), *cert. denied*, 353 U. S. 984 (1957) 18

United States v. *Amadio*, 215 F. 2d 605 (7th Cir.), *rev'd on other grounds*, 348 U. S. 892 (1954) 26

United States v. *Bacha*, 271 Fed. 454 (2d Cir. 1921) 33

United States v. *Brandenburg*, 162 F. 2d 980 (3d Cir.), *cert. denied*, 332 U. S. 769 (1947) 28

PAGE

United States v. *Castro*, 228 F. 2d 807 (2d Cir.), *cert. denied*, 351 U. S. 940 (1956) 16

United States v. *Cioffi*, 242 F. 2d 473 (2d Cir. 1957) . . 23, 35

United States v. *DiCarlo*, 64 F. 2d 15 (2d Cir. 1933) .. 34

United States v. *Feinberg*, 140 F. 2d 592 (2d Cir. 1944) 16

United States v. *Hiss*, 185 F. 2d 822 (2d Cir. 1950), *cert. denied*, 340 U. S. 948 (1951) 25

United States v. *Lindenfeld*, 142 F. 2d 829 (2d Cir.), *cert. denied*, 323 U. S. 761 (1944) 28

United States v. *Masiello*, 235 F. 2d 279 (2d Cir.), *cert. denied sub nom. Stickel* v. *United States*, 352 U. S. 882 (1956) 15

United States v. *Romero*, — F. 2d — (2d Cir. 1957) 23

United States v. *Ratkin*, 189 F. 2d 431 (3d Cir. 1951), *aff'd*, 343 U. S. 130, *rehearing denied*, 343 U. S. 952 (1952) 35

United States v. *Sherman*, 171 F. 2d 619 (2d Cir. 1948) 35

United States v. *Sherman*, 200 F. 2d 880 (2d Cir. 1952) 27

United States v. *Sherman*, 240 F. 2d 949 (2d Cir.), *cert. granted*, 353 U. S. 935 (1957) 27

United States v. *Simone*, 205 F. 2d 480 (2d Cir. 1953) 17

United States v. *White*, 223 F. 2d 674 (2d Cir.), *cert. denied*, 348 U. S. 900 (1955) 27

Virginia Ry. Co. v. *Armentrout*, 166 F. 2d 400 (4th Cir. 1948) 35

Weinbaum v. *United States*, 184 F. 2d 330 (9th Cir. 1950) 25

Statutes and Rules Cited

	PAGE
Title 18, United States Code, Section 371	3
Title 21, United States Code, Section 173	3
Title 21, United States Code (1952), Section 174 (Prior to amendment of July 18, 1956)	4
Title 21, United States Code (Supp. IV 1957), Section 174 (As amended July 18, 1956, 70 Stat. 570)	2, 6
Federal Rules of Criminal Procedure, Rule 30	35
Federal Rules of Criminal Procedure, Rule 52	32

Other Authority Cited

3 *Wigmore on Evidence*, § 1014, (3d ed. 1940) 35

INDEX TO APPENDIX

Statement of Benjamin Harrell 1a

Indictment 4a

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

— v —

JOSEPH GERNIE and EDWARD OGULL,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Statement

This is an appeal from judgments of conviction entered against appellants in the United States District Court for the Southern District of New York, after a trial before Honorable Edmund L. Palmieri, District Judge, and a jury.

The indictment was in seven counts.

Count One charged Ogull and one Buzzeo with the sale of 8 ounces, 273 grains of heroin on April 14, 1956.

Count Two charged Gernie, Ogull, Buzzeo, and one Mayer with the sale of 8 ounces, 211 grains of heroin on June 4, 1956.

Count Three charged Gernie, Ogull, and Buzzeo with the sale of 8 ounces, 235 grains of heroin on July 12, 1956.

Count Four charged Gernie and Mayer with the sale of 1 ounce of heroin on August 2, 1956.

Count Five charged Gernie and Mayer with the sale of 2 ounces, 315 grains of heroin on August 6, 1956.

Count Six charged Gernie and Mayer with the possession of 57 ounces, 340 grains of heroin on September 18, 1956.

Count Seven charged Gernie, Ogull, Buzzeo, and Mayer with conspiring to violate the federal narcotic laws (Gernie App. pp. 7a-15a).

On the day set for trial Buzzeo and Mayer pleaded guilty to all counts of the indictment in which they were named. Buzzeo was sentenced to five years, and a fine of $5,000 was imposed. Mayer was sentenced to five years, six months (Gernie App. pp. 2a, 3a-4a). The case against Gernie and Ogull proceeded to trial.

At the close of the Government's case, Count Four was withdrawn[1] (327).[2]

Gernie did not testify. Ogull took the witness stand and attempted to set forth a defense of entrapment (359). He also claimed he withdrew from the conspiracy prior to the passage of the Jones-Miller Act (Title 21, United States Code (Supp. IV 1957), Section 174, as amended July 18, 1956, 70 Stat. 570) (372-5).

---

[1] Page 3a of appellants' appendix erroneously refers to a verdict of guilty against Gernie on Count Four. There is no such docket entry.

[2] All references are to the typewritten transcript of the trial minutes, unless otherwise stated.

On February 11, 1957, after six trial days, the jury found Gernie and Ogull guilty as charged (Gernie App. 2a-3a. But see Footnote 1, *supra*).

Gernie was sentenced to imprisonment for five years on Counts Two and Three and ten years on Counts Five, Six, and Seven, all sentences to run concurrently. In addition, a fine of $5,000 was imposed under Count Seven (Gernie App. p. 4a).

Ogull was sentenced to imprisonment for five years on Counts One, Two, Three, and Seven, all sentences to run concurrently (Gernie App. p. 3a).

Statutes Involved

Title 18, United States Code §371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, §1, 62 Stat. 701.)

Title 21, United States Code §173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or

any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

Title 21, United States Code (1952), (Prior to Amendment of July 18, 1956, 70 Stat. 570) §174. *Same, penalty;*

evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556) as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States Attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States Attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or

deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted or if he acknowledges that he is such person, he shall be sentenced as prescribed in this section.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, ch. 100, §2(c), 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; Nov. 2, 1951, ch. 666, §§1, 5(1), 65 Stat. 767).

Title 21, United States Code (Supp. IV, 1957) (As amended July 18, 1956, 70 Stat. 570) §174. *Same; penalty; evidence.* Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more

than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570).

Introduction to the Facts

The evidence disclosed the existence of a conspiracy to deal in large quantities of contraband heroin. Approximately eighty-five ounces of heroin were involved in this case alone. There were three large sales of pure heroin, which totalled over 25 ounces, at prices totalling $8,550.00. In addition there was a much smaller sale of 2 ounces, 315 grains of heroin.

Gernie was the source of the heroin. He was assisted by Mayer, his nephew. The drugs and the extensive cutting and packaging paraphernalia required by this large enterprise were kept in Mayer's apartment.

Buzzeo purchased heroin from Gernie. Buzzeo resold this heroin to Wurms, an undercover agent of the Bureau of Narcotics. Arrangements for these re-sales were made by Ogull. Gernie and Mayer also sold heroin to one Harell.

References to the record appear below.

The Facts

On the afternoon of April 13, 1956 a special employe of the Bureau of Narcotics (Berner) introduced an undercover narcotic agent (Wurms) to the appellant Ogull.[3] Ogull telephoned and Buzzeo arrived. Buzzeo was introduced to Wurms. Ogull had told Buzzeo that Wurms wanted heroin of 85% purity. Arrangements were made for the sale that evening of a quarter kilogram of heroin for $2,750. (26-31).

Buzzeo did not make the sale that night, because he was, in his own words, being cautious. (36). The sale was postponed until the next evening. (36-7).

On April 14, 1956 Buzzeo sold 8 ounces, 273 grains of heroin[4] to Wurms for $2,750. Buzzeo instructed Wurms to call Ogull when he wanted more heroin. (37-9, 147).

Wurms met Ogull again on April 20, 1956.[5]

When Wurms complained of the manner of arranging for their heroin transactions, Ogull advised him not to be impatient. Ogull praised the quality of the heroin. He told Wurms that the delay during the first sale, occasioned by Buzzeo's caution, would not be repeated. (45-6).

On April 27, 1956 Wurms again met Ogull. Ogull tried to sell Wurms cocaine at $1,300 an ounce. (47-8). Buzzeo

[3] That was the full extent of Berner's part in this case.

[4] Testimony concerning the weights and analyses of all narcotic exhibits admitted into evidence appears at pages 257-75 of the minutes.

[5] Berner was present, but he did not participate in the ensuing conversation.

had previously tried to sell cocaine to Wurms. (32-3). Wurms had never before discussed cocaine with Ogull. (48). Ogull said he was quoting the price Buzzeo wanted. (48).

Ogull then asked when Wurms would make another purchase of heroin. Wurms was not yet ready to buy again. Ogull too was not ready to do business that night. He told Wurms he would have to telephone Buzzeo and tell him the transaction would not go through. Ogull then made a telephone call. (48-9).

Wurms telephoned Ogull on May 3, 1956. Later that evening they met as arranged. Wurms was ready to do business but Ogull said that Buzzeo was not available. Ogull added that Buzzeo had been waiting to sell heroin to Wurms on the prior occasion.

Ogull said he would get in touch with Buzzeo, and asked whether Wurms, who posed as a non-New Yorker, would be in town. When Wurms said he was leaving, Ogull asked the time of departure. Ogull told Wurms to call him before leaving the next day to see if he had been able to contact Buzzeo. (50-1).

Wurms called Ogull the next day, May 4, 1956, but Ogull had not been able to get Buzzeo. This attempt was repeated on May 7, 10, and 11, 1956, without success. (51-2).

On May 22, 1956 Wurms and Ogull met at the Scarlet Patch Bar, pursuant to their prior telephone conversation. Wurms asked Ogull to introduce him to a new source of supply. Ogull refused, saying, "This isn't Delancey Street." Ogull told Wurms he would have to wait until Buzzeo returned. Ogull tried to persuade Wurms to buy a whole kilogram of heroin, about 35 ounces, next time. (53-4).

Wurms telephoned Ogull on June 1, 1956 and they arranged to meet. Ogull asked Wurms how much heroin he wanted. When Wurms ordered only a quarter kilogram of heroin, Ogull expressed great disappointment. Ogull hoped Wurms would make larger purchases more frequently. Ogull said he had been taken to task for selling Wurms the first quarter kilogram of heroin at too low a price, and that the price for the next quarter kilogram would be a few hundred dollars more than the original price of $2,750. He said it would do Wurms no good to argue about the price. (54-5).

Ogull telephoned Buzzeo and arranged a meeting between Wurms and Buzzeo for later in the day. Wurms met Buzzeo at the time and place specified by Ogull. Wurms ordered a quarter kilogram of heroin, and, as Ogull had said, the price went up. This time it was $3,000. Buzzeo advised Wurms that the quality of the heroin would be the same as before, because it would come from the same source (56). The actual transaction was arranged for June 4, 1956 (58).

On June 4, 1956 at 9:30 p. m. Wurms and Buzzeo met at the Ship Ahoy Bar, 101 West 66th Street (58, 37). Buzzeo said they would have to go elsewhere to get the heroin. Shortly after, they left the Ship Ahoy Bar and walked to Buzzeo's automobile (58-9). They drove to 76th Street and parked across the street from the Devonshire Garage, located on 76th Street, east of Broadway (59-60).[6] Buzzeo did not yet have the heroin. He had

[6] The Lighthouse is on the northeast corner of 76th Street and Broadway. The front entrance is on Broadway. The bar extends toward the Devonshire Garage on 76th Street. There is a side entrance to the Lighthouse on 76th Street, close to the Devonshire Garage (80).

to pick it up. Buzzeo obtained $3,000 from Wurms and left Wurms in the car. It was about 9:55 p. m. Buzzeo went to the Lighthouse Bar, at 76th Street and Broadway where he telephoned (162, 209).

Gernie arrived at the Lighthouse Bar within five minutes and joined Buzzeo. They conversed briefly. Gernie telephoned, and then again spoke to Buzzeo. Gernie stationed himself at a window of the Lighthouse Bar looking out on 76th Street (162-4, 210).

Mayer drove by in an Oldsmobile usually used by Gernie and the registration of which was in Gernie's possession (61, 181-2, 210). Thereupon Gernie abruptly left his observation post at the window, spoke to Buzzeo, and walked over to the Devonshire Garage (164-5, 210-11).

At the Devonshire Garage Gernie met Mayer, after which Mayer drove off in the Oldsmobile (165, 61-2, 211). Gernie then returned to the Lighthouse Bar, where he picked up Buzzeo. Gernie and Buzzeo went to the Devonshire Garage.

Buzzeo emerged from the Devonshire Garage, carefully watched by Gernie. Buzzeo rejoined Wurms in the parked automobile, announcing, "I have the stuff." Buzzeo and Wurms drove off, as Gernie still watched them (166, 62). Buzzeo turned the 8 ounces, 211 grains of heroin over to Wurms (63).[7]

On June 12, 1956 Wurms telephoned Ogull. They met. Wurms complained about the quality, quantity and price of the heroin he purchased on June 4, 1956. Ogull telephoned Buzzeo, who came right over. Ogull, Buzzeo, and

[7] See note 4, *supra*.

Wurms discussed the matter. Buzzeo offered to reduce the next price by $200. Ogull gave Wurms his home telephone number to facilitate the next heroin transaction, which would still be arranged through Ogull (Gov. Ex. 3, 68-72, 429).

Wurms met Buzzeo again on July 11, 1956. The meeting was arranged by Ogull. They discussed another heroin transaction (72-3).

On July 12, 1956 Wurms and Buzzeo met at the Dolphin Cafe, 1975 Broadway, at 9 p. m. (74-5). They left at 10:30 p. m. and again drove to the vicinity of the Devonshire Garage. Buzzeo went to get the heroin from the same source of supply (75-7, 167). Wurms gave Buzzeo $2,800. The serial numbers of the bills had been recorded (77). At about 10:45 p. m. Buzzeo left Wurms and went to the Lighthouse Bar.

Gernie then drove up in the Oldsmobile. He left the Oldsmobile at the Devonshire Garage and walked to the Lighthouse Bar, where he met Buzzeo. They shook hands (79-80, 167-8). Gernie and Buzzeo walked to the Devonshire Garage, with Buzzeo walking ahead and Gernie following four feet behind Buzzeo, the man with whom he had just shaken hands (80-1, 168).

Buzzeo got into the Oldsmobile which Gernie had just left. A moment later he was out of the Oldsmobile. Buzzeo then spoke to Gernie, who was watching through the window of the Devonshire Garage, after which he rejoined Wurms. Buzzeo took 8 ounces, 235 grains of heroin from under his sport shirt, where it was held between his belt and the waistband of his trousers, and gave it to Wurms (81-2, 168-9, 178).[8]

[8] See note 4, *supra*.

On August 2, 1956 a man named Harell visited Mayer. Mayer immediately drove off and went into 307 West 69th Street. Gernie's Oldsmobile was parked in the block. Gernie was in 307 West 69th Street, where Mayer joined him. He came out with Mayer, and, when Mayer drove off to a meeting with Harell, Gernie re-entered 307 West 69th Street (204-8, 212-14).

On August 6, 1956 Gernie drove up to 67th Street and Columbus Avenue, where he parked. Gernie walked over to Mayer's car, a Pontiac, and threw a dark package into it. He then entered the 67th Street Garage, where he met Mayer. Mayer immediately left the 67th Street Garage and drove off in the Pontiac. Mayer drove to and entered 307 West 69th Street (152-3, 159-60, 323).

Gernie was joined in the 67th Street Garage by Harell. They conversed. Harell left in a few minutes and drove off. At 102nd Street and the East River Drive Harell and his companions were arrested. Harell had 2 ounces, 215 grains of heroin[9] (154, 157-8, 216-17, 323).

On August 10, 1956 Ogull telephoned Wurms and offered "to do him some good." Ogull arranged a meeting and invited Buzzeo. When Wurms said he was going to Cuba on a gambling deal, Ogull said, "Are you sure you are not going for something else?" Buzzeo volunteered that he had good connections in Cuba—"for gambling or anything else" (511-13, 515).

Mayer was arrested on September 18, 1956 at 307 West 69th Street. On his person and in his apartment were found 57 ounces, 340 grains of heroin[10] (221-51).

[9] See note 4, *supra*.

[10] See note 4, *supra*.

In his pocket Mayer had two double glassine envelopes, containing 474 grains of heroin and 252 grains of heroin, respectively. From a dresser Mayer produced a leatherette case holding twenty-five double glassine envelopes which contained 22 ounces, 85 grains of heroin. A double brown paper bag in the children's bedroom yielded 17 ounces, 285 grains of pure heroin. Another brown paper bag in the children's bedroom yielded 17 ounces, 285 grains of pure heroin. Another brown paper bag held five double glassine envelopes with 4 ounces, 268 grains of heroin. Yet another brown paper bag was found, containing twelve double glassine envelopes with 12 ounces, 275 grains of heroin. And under his daughter's bed lay a box containing:

Hamilton postal scale
Pelouze Mfg. Co. scale, with five weights and two trays
Speed stapling machine
Acciliner stapling machine
Three boxes of staples
Three large boxes of glassine envelopes
Four and one-half blocks of mannite
One can of milk sugar
Two cans of dextrose
One jar of quinine hydrochloride
Four spoons
Six sieves
One spatula

(292, 495).

The Speed stapling machine (Gov. Ex. 10 U, 227, 292) was the machine which pressed the staples to seal: (1) the quarter kilogram of heroin purchased on July 12, 1956 by Wurms, when Buzzeo got it from Gernie's Oldsmobile

(83-4), and (2) the 2 ounces, 215 grains of heroin seized from Harell on August 6, 1956 after his visit to Gernie (218-20) (290-1).

Gernie was arrested on September 18, 1956 (169). He had in his possession one of the $100 bills Wurms paid over to Buzzeo on July 12, 1956 (Gov. Ex. 6A, 170-4). Gernie denied having anything to do with the Oldsmobile; but he drove it many times, and the registration was then found in his possession (174-5, 213-14).

Ogull was arrested on October 4, 1956. He was confronted with Agent Wurms. Ogull looked at Wurms and said, "I never seen you before in my life" (88-9).

POINT 1

Gernie's role as the source of the heroin was conclusively established by the detailed observations of six agents, his possession of marked money, and his false disclaimer of knowledge of the automobile used in heroin transactions.

Appellant Gernie argues that the Trial Court erred in submitting the case against him to the jury. He contends that the Government introduced no evidence of his guilt. Gernie sees no jury issue at all. This claim can hardly be made with much hope.

The test for the Trial Court to apply in determining what rational inferences of fact a jury may be permitted to draw from the testimony is the same in civil and criminal cases. The standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases. *United States* v. *Masiello*, 235 F. 2d 279, 284-5 (2d

Cir.), *cert. denied sub nom. Stickel* v. *United States*, 352 U. S. 882 (1956); *United States* v. *Castro*, 228 F. 2d 807, 808 (2d Cir.), *cert. denied*, 351 U. S. 940 (1956); *United States* v. *Feinberg*, 140 F. 2d 502, 594 (2d Cir. 1944).

In view of the overwhelming evidence against Gernie, the Trial Court was amply justified in sending the case to the jury, for the Government's evidence was clearly sufficient to justify the conviction "whatever nuances of doctrines are applied."

Six agents testified against Gernie.[11] The totatility of their observations, made from different vantage points and at different times, provided the complete picture of Gernie's crimes. The events to which each agent testified were not unrelated fortuitous circumstances. Each agent testified to a different phase of the events in question. Collectively they furnished a chronological account of the activities of Ogull, Buzzeo, Mayer, Harell, and Gernie during Gernie's heroin transactions.

Added to this was the testimony of Mr. Liota, proving the common source of the heroin seized from Harell, purchased from Buzzeo, and found with Mayer. The markings on the staples taken from the packages seized from Harell and purchased from Buzzeo were identical. The Speed stapling machine from which they were pressed was among the cutting and packaging paraphernalia found with the heroin in Mayer's apartment.

Gernie was found in possession of one of the same $100 bills Agent Wurms gave Buzzeo shortly before Buzzeo met Gernie and returned to Agent Wurms with heroin.

---

[11] The record references to the facts referred to in Point 1 appear in The Facts, pages 8-15, *supra*.

His defense did not deny or explain his possession of the bill, which was admitted without objection (173).

Gernie showed his consciousness of guilt when he falsely attempted to disassociate himself from the Oldsmobile. *United States v. Simone*, 205 F. 2d 480, 482-3 (2d Cir. 1953).

The proof against Gernie was uncontradicted and unexplained by the defense, except for four pages of testimony by Mayer. Mayer, a relative of Gernie, had pleaded guilty to the full indictment. He denied any narcotic dealings with Gernie (461-5). However, in summation, Gernie's counsel repudiated Mayer in strong language (554).

On cross-examination Mayer testified that he obtained the narcotics and cutting and packaging paraphernalia from a man named Harry in a bar on Columbus Avenue. Mayer said he did not know Harry's surname or the name or address of the bar (469, 471, 491, 494).

According to Mayer, Harry asked him what he thought about narcotics, to which he replied, "Well, everybody has to make a living their own way as far as I am concerned" (470). Eventually Mayer, prepared to do "anything for money", decided to deliver narcotics for Harry and obtained a carton from him. Mayer did not open the carton for a week. When he finally opened it for a brief second out of curiosity, he saw nothing but a few strainers. Mayer denied having seen the remainder of the heroin cutting and packaging paraphernalia (Gov. Ex. 10, 473, 479-87).

Mayer said he obtained the narcotics found on September 18, 1956 at subsequent meetings with Harry (473-9).

Mayer denied having implicated Gernie after he was arrested (487-8, 491, 497-9, 501, 503). The Devonshire Garage meant nothing to him, and he did not recall meeting Gernie at the West 67th Street Garage (504-5).

In rebuttal, Agent Pera explained how Mayer had implicated Gernie after his arrest. The narcotics in Mayer's apartment belonged to Gernie. Gernie paid Mayer $50 to $100 per week for keeping the heroin and making deliveries (517-21).[12]

The jury could properly consider Mayer's testimony which purported to exculpate Gernie, and conclude that the opposite was true. *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925, 933 (2d Cir.), *cert. denied*, 353 U. S. 984 (1957); *Di Carlo* v. *United States*, 6 F. 2d 364, 367-8 (2d Cir. 1925).

In sum, Gernie's guilt was conclusively established. A rational jury could not have failed to convict.

[12] The jury was carefully and properly instructed as to the probative value of Pera's rebuttal testimony (544-7, 589-90).

POINT 2

The Government's inability to produce a minor informer who was long known to the defense did not entitle Ogull to ask irrelevant or immaterial questions.

Appellant Ogull finds error in the Government's inability to produce at the trial an informer named Maxwell Berner, whose only function was to introduce an undercover agent to Ogull. Ogull contends that Berner's absence entitled him to ask questions at the trial that were irrelevant and immaterial. Berner had nothing to do with the three sales of heroin by Ogull and Buzzeo to Agent Wurms. He participated in but one conversation, that of April 13, 1956 (See p. 8, *supra*).

Upon his arrest on October 4, 1956, Ogull denied ever having seen Agent Wurms (88-9). Naturally, Ogull had not the least desire to have the Government produce Berner, who would give the lie to this exculpatory statement. Surely no defense of entrapment was indicated prior to the trial. Indeed, if Ogull or his trial counsel really wanted to find Berner, they could have done so. They both knew Berner for many years (8, 342, 376).

When the trial began four months later, Ogull for the first time demanded Berner be produced in Court (Gernie App. pp. 2a, 16a-17a). By this time Berner's whereabouts were unknown (101, 143, 147, 9, 103-4).[13]

[13] This sworn testimony appears in the record at pages 101, 143, and 147. Yet appellant's brief at pages 20 and 22 baldly states there was no such testimony.

gations at pages 22-4 of appellant's brief can only lead one to marvel at his total lack of familiarity with the record. Agent Wurms met Berner near the Bureau of Narcotics. He was introduced by Group Leader Amato (90). Agent Wurms knew Berner's business address, which he volunteered on cross-examination (92). Agent Wurms knew Berner's wife's address, which Ogull did not even request (101). Agent Wurms had Berner's last address in Brooklyn, which offer Ogull refused (101).

Ogull next turns to the prosecutor's answer to trial counsel's wholly untrue and unsupported statement that "the Government knows where Berner is," an allegation which flies in the face of the sworn testimony (103-4). In the prosecutor's answer that the record shows no such thing, Ogull sees "carefully chosen language"; and he soars to new heights of hyperbole (Gernie Brief pp. 22-3). Sworn testimony vanishes at the brief writer's touch.

Trial counsel for Ogull felt he had requested Berner's presence when "in the corridor I very casually said to Mr. Londin, 'Are you going to have Max Berner as a Witness?' and he shrugged and smiled and I took it for granted . . ." (104-5). This is but further proof, not that Ogull hoped Berner would testify and wanted to find him, but rather that Ogull feared Berner might testify and made no pre-trial inquiry as to his whereabouts.

POINT 3

The Government had no knowledge that Harell would invoke the Fifth Amendment. Accordingly, there was no error in calling him as a witness. Any prejudice to Gernie was cured by the instructions to the jury.

Appellant Gernie contends that the Government, to his prejudice, called Harell as a witness when it knew he would claim the Fifth Amendment. The record belies this contention.

The Government sought to question Harell only about the transaction of August 6, 1956 (295-7). And at the time he was called, Harell had been indicted, had pleaded guilty, and had received a five year sentence under an indictment charging him with the possession, transportation, etc. of heroin on August 6, 1956, and with a conspiracy also related to that date (298-9).[14] Since Harell had been convicted and sentenced for the very crime concerning which the Government sought to examine him, he no longer had any right to claim the Fifth Amendment on this matter. *United States* v. *Romero*, — F. 2d — (2d Cir. 1957); *United States* v. *Cioffi*, 242 F. 2d 473, 477 (2d Cir. 1957).

Furthermore, Harell had testified against Gernie before the Grand Jury and had given a signed statement implicating Gernie. A transcript of his Grand Jury testimony was marked as Court's Exhibit 2. Gernie's photo-

[14] A copy of the indictment was marked "Court's Exhibit 4" (308; Gov't App. pp. 4a-7a).

graph, referred to therein as a Grand Jury Exhibit, was marked as Court's Exhibit 3. Harell's signed statement was marked as Court's Exhibit 1 (301-3; Gov. App. pp. 1a-3a).

Before calling him as a witness at the trial, the prosecutor spoke to Harell twice. At neither time did Harell indicate he would plead the Fifth Amendment. Harell's only intimation of hostility was his claim that he was improperly advised when he signed a statement and testified before the Grand Jury (540).

In answer to this, the prosecutor reminded Harell of his letters to Judge Ryan, Judge Cashin and a former Assistant United States Attorney. In these unsolicited letters Harell wrote that his cooperation had been given voluntarily, out of a sense of duty, and without expectation of reward (540-1).

Harell replied he was afraid to testify against Gernie. Harell's former attorney, a representative of the Legal Aid Society, confirmed that Harell was so terrified he insisted on pleading guilty and going to jail (541).

The Trial Court agreed that the Government had no intimation of Harell's claim of privilege under the Fifth Amendment (536). And the only indication that Gernie's trial counsel could find that the Government anticipated Harell's plea of the Fifth Amendment was a Government memorandum of law (538). However, this memorandum, prepared as a matter of prudence, concerned only the examination of a hostile witness called by the Government. It did not deal with such witness' plea of the Fifth Amendment. (301-2).

> propriety in the prosecutor's continuing to interrogate the witness.
>
> The whole matter becomes too clear for argument when it is noted that the court twice charged the jury to disregard the whole incident."

And in *United States* v. *Amadio*, 215 F. 2d 605 (7th Cir.), *rev'd on other grounds*, 348 U. S. 892 (1954), a prosecution for violation of the Mann Act, the court found that the Government had called two witnesses to the stand whom it knew intended to invoke the Fifth Amendment, and who subsequently did so. Nonetheless, because of the trial court's charge that the invocation of this plea should not be construed against the defendants in any way, the court held that no prejudice had resulted to the defendant, and the conviction was sustained.

From the above cases, it is clear that even where the Government knows in advance that a witness it plans to call will plead the Fifth Amendment, no reversible error results if the court instructs the jury that no unfavorable inferences against the defendant are to be drawn from the invocation of the privilege. In the case at bar, not only were such instructions given to the jury, but there was no knowledge in advance by the Government that Harell would take the Fifth Amendment. Under these circumstances, there very clearly was no error resulting from the action of the Government in calling Harell.

POINT 4

The Trial Court properly left Ogull's defense of entrapment to the jury.

Appellant Ogull claims that the record establishes his defense of entrapment as a matter of law. He feels it is pointless to refer to any part of the record. Appellant Gernie, who dealt directly with Buzzeo and others, and who had nothing to do with Ogull or Berner, or Agent Wurms, sees himself as the beneficiary of Ogull's felicity. They see no jury issue at all. This claim can hardly be made with much hope. Gernie's claim does not even merit discussion.

Under the defense of entrapment the appellant has the burden to establish a prima facie case: that a Government agent induced him to commit the crimes charged in the indictment. Even then the matter is not at an end. The Government may still make a valid reply to that defense by showing that its agent was not perverting an innocent mind, but was acting on a mind ready and willing without persuasion to commit the criminal offenses charged. The Government sustains this burden of proof on its reply by offering evidence of the appellant's activity of a similar nature, preparation for the particular crime committed, or "ready complaisance." *United States* v. *Sherman*, 200 F. 2d 880 (2nd Cir. 1952); *United States* v. *Sherman*, 240 F. 2d 949 (2nd Cir.), *cert. granted* 353 U. S. 935 (1957); *Sorrells* v. *United States*, 287 U. S. 435 (1932); *United States* v. *White*, 223 F. 2d 674 (2nd Cir.), *cert. denied* 350 U. S. 888 (1955); *Trice* v. *United States*, 211 F. 2d 513 (9th Cir.), *cert. denied*, 348 U. S. 900 (1954).

All this the Trial Court charged, and its instructions to the jury on this issue were unexceptionable and clear (579-83). The issue now is whether there was sufficient evidence to support a finding either that Ogull's prima facie showing of entrapment was not made out, or that the Government's reply to the prima facie showing was valid. If either can be supported by the record, the jury's verdict is dispositive of the issue. *United States* v. *Brandenberg*, 162 F. 2d 980, 981-2 (3rd Cir.), *cert. denied*, 332 U. S. 769 (1947); *United States* v. *Mallah*, 149 F. 2d 219, 222 (2nd Cir.) *cert. denied*, 326 U. S. 724 (1945); *United States* v. *Lindenfeld*, 142 F. 2d 829, 831 (2nd Cir.), *cert. denied* 323 U. S. 761 (1944).

The record contains evidence galore to support a finding that Ogull did not make a prima facie showing of entrapment and that the Government made a valid reply. Indeed, the record supports no other conclusions.

From the outset, the evidence demonstrated that Ogull—far from being an innocent victim enticed against his will into the narcotics trade—was a ready and willing participant and, indeed, on occasion, an aggressive promoter of the illicit enterprise.

Agent Wurms testified that after Ogull had brought Wurms and Buzzeo together for the first sale, on April 13, 1956, Buzzeo told Wurms that if he wanted any more heroin, he should contact Ogull (39). On April 27, two weeks later, Wurms saw Ogull again, and on this occasion Ogull asked Wurms if Wurms wanted any cocaine, telling him that he and Buzzeo had five "pieces" (47-8). Agent Wurms declined because the price which Ogull said Buzzeo had told him to ask was too high (48). Ogull asked him when he would be ready to "go another one" (49).

About a month later, on May 22, Wurms asked Ogull to introduce him to some other source of supply besides Buzzeo and Ogull replied "no, this isn't Delancey Street" (53). At this same time, Ogull asked Wurms why he didn't pick up "a whole one" the next time (53). When, on June 1, Wurms told him it would still have to be a quarter of a kilo, Ogull was "disappointed" because he thought the arrangement was that Wurms would pick up a quarter kilo or better more frequently (54).

About three weeks later, on June 12, Ogull gave to Wurms his home phone number where he could be reached after work (71), and about a month after that, on July 12, Ogull arranged a third sale between Buzzeo and Wurms (77 *et seq.*). Finally, on August 10, 1956, Ogull telephoned Wurms, stating that he had heard that Wurms was leaving town and that he wanted to talk to Wurms. He stated that possibly he could "do him some good" before he left. At Ogull's insistence, Wurms met him, and unsolicited by Wurms, Ogull brought his heroin-peddling friend Buzzeo along. Ogull told Wurms that he understood Wurms was going to Cuba, and wanted to know what he was going there for. When Wurms told him it was a gambling deal, Ogull said "are you sure you are not going for something else" and Buzzeo volunteered that he had good connections down there for gambling "or anything else" (511-513).[15]

Certainly this evidence belies the impression of an innocent man lured into crime by agents of the government. And the Trial Court so held (335).

---

[15] This testimony of Agent Wurms with respect to this transaction directly contradicted that of Ogull, who claimed that he had withdrawn from the business in the beginning of July (374) and that he had no discussions with Agent Wurms after July 12, 1956 (397).

In an effort to establish his case of entrapment, Ogull claimed that he had been induced to arrange for the sales by Buzzeo to Wurms by special employee Max Berner. He claimed that he agreed to obtain narcotics for Wurms, as a friend of Berner's, only after Berner had told him that Berner might have someone who might help him financially in a real estate deal which Ogull professedly was contemplating going into with Buzzeo (361-2).

On cross-examination, however, Ogull confessed that during 1956 he "never gave * * * a thought" to how Buzzeo earned his livelihood, and stated only that he thought he worked in a bar (440-1). Furthermore, Wurms testified that Ogull did not inquire of him as to his occupation, or in any way mention to him any real estate, or restaurant business (112-4).

In his direct testimony, Ogull claimed that prior to the April 13, 1956 meeting, he had not told Buzzeo anything about the fact that narcotics were involved (364). On cross-examination, however, he admitted that he had told Buzzeo prior to the meeting that "it wasn't just a real estate deal" and that narcotics were involved (390)—a story which seems the more plausible in the light of Buzzeo's furtive conduct when first entering the bar on that date (407-8), and Buzzeo's request that he be introduced as "Bob", although Ogull had known him as "Phillip" (390). Furthermore, Ogull conceded that at the time Berner first approached him, the term "junk" was known to him as a "common phrase" (381).

The evidence demonstrates that Ogull dealt with Wurms on a regular basis from April 13, 1956 until at least August 10, 1956—a four month period—during which three

sales of narcotics were effected. Nowhere in this period was there forthcoming from Berner any evidence of compliance with his part of the bargain. Yet Ogull went ahead with his end of the deal. The only explanation offered by Ogull for his continuation of this unilateral arrangement was that he felt "I wasn't going out of my way too much and could do them a favor"—hardly a convincing story from a man who, by his own admission was fully aware of the risks he was running by his acts (447).

The issue for the jury was clear. As stated by the Trial Court, it was whether they believed Wurms or Ogull (583). On the evidence, as outlined above, there can be no question but that the jury's decision to believe Agent Wurms was completely justified.

POINT 5

Ogull's motion for a mistrial because of testimony relating to a gambling enterprise of Buzzeo's was properly denied.

Appellant Ogull alleges error in the denial of his motion for a mistrial based on the following testimony of Agent Wurms with respect to a conversation between Wurms, Ogull and Buzzeo on August 10, 1956:

> "Q. Was it on that occasion that you discussed real estate? A. Phil Buzzeo mentioned a piece of property that a friend of his had out in California that he had just returned from California and this person wanted to sell it. It was a restaurant and, I believe, in the back they could carry on some gambling games" (513).

Ogull claims that this testimony indicated that Ogull was contemplating opening a gambling house in California. He then further claims that gambling is a crime in California, and, therefore, that he was prejudiced in the eyes of the jury by proof of unrelated crimes.

Upon examination of the record, however, it is clear that this statement—dealing with a matter which Ogull had opened up in his direct case (360 *et seq.*)—refers only to Buzzeo, and not to Ogull. Accordingly, there is no basis for any claim of prejudice to Ogull on this point.

Furthermore, even if this statement could be construed to extend to Ogull, the reference to gambling was far too remote to in any way justify an inference that Ogull was contemplating entering the gambling business. Any error that may have been committed was clearly "harmless" within the meaning of Rule 52, Federal Rules of Criminal Procedure.

POINT 6

The Trial Court did not err in refusing to strike testimony that Gernie had in his possession a marked bill more than two months after it had been paid over to Buzzeo.

Appellant Gernie claims error in the refusal of the Trial Court to strike testimony—originally admitted without objection (170-1)—that at the time of his arrest on September 18, 1956, Gernie had in his possession a marked $100 bill used by a narcotics agent to purchase narcotics from Buzzeo on July 12, 1956. This objection, we submit, is patently without merit.

The testimony as to Gernie's unexplained possession of the marked $100 bill used in the July 12, 1956 sale by Buzzeo to Agent Wurms was clearly relevant to the question of Gernie's connection with that sale and with the conspiracy. As stated in *Lee* v. *United States*, 245 F. 2d 322, 325 (9th Cir. 1957), a case cited at page 35 of appellant's brief:

> "It was proper for the government to produce evidence in its case-in-chief to the effect that the money found in appellant's possession was part of the advance funds an agent had given Hung. This, along with the other circumstances, tended to prove that there had been a contact between appellant and Hung, or Hung's associate Fong, between the time Hung received the money from the agent and the time Hung delivered narcotics to the agent. It also gave rise to a permissible inference that, on the occasion of that contact, appellant had delivered some article, or rendered some service, to Hung or Fong."[16]

The fact that such possession was found two months after the sale does not destroy the relevancy of the evidence; at best, it goes only to its weight. As stated by this Court in *United States* v. *Boehm*, 271 Fed. 454, 457 (2d Cir. 1921), in affirming a conviction based largely on possession of stolen goods some four months after the actual theft:

> "What may be deemed to be recent possession is a question of fact for the jury. * * * The presumption

[16] The language from this case relied on by appellant refers to a marked bill found in defendant's possession over two years prior to the dates of the crimes charged in the indictment. As such, the court found, evidence of the possession of this bill was prejudicial under the doctrine forbidding evidence of prior misconduct.

> of guilt flowing from such possession grows weaker as the time of possession recedes from the time of the original taking. The fact itself is one for the consideration of the jury under all the circumstances. * * * The lapse of time from the theft of the property until the tires were found in the constructive possession of the plaintiff in error, we think, does not deprive such possession of the property of its probative effect, as a fact from which an inference of guilt of the plaintiff in error could be drawn by the jury."

See also *United States* v. *DiCarlo*, 64 F. 2d 15 (2d Cir. 1933) (Dyer Act conviction upheld partly on basis of proof that defendant had been found in possession of car stolen three months previously).

The cases cited by appellant, other than the *Lee* case, all deal with situations where there was absolutely no connection between the money found in defendant's possession and the crime with which he was charged. Here, by virtue of the fact that the bill found in Gernie's possession had been used in the purchase of narcotics from Buzzeo on July 12, 1956, such a connection was clearly established.

POINT 7

The Trial Court correctly charged the jury as to the rule *falsus in uno, falsus in omnibus.*

The court instructed the jury with respect to witnesses who tell wilful falsehoods as follows:

> "What do you do with witnesses if you find they told wilful falsehoods? The law says that you can either reject everything on the ground that all of the testimony is tainted by that falsehood or that you can accept that which is credible and reject that which is incredible. That is what the law says you can do with respect to witnesses who you believe told a wilful falsehood" (589).

No exception was taken to this charge at the time of the trial. Accordingly, we submit, none can be taken now. Rule 30, Federal Rules of Criminal Procedure; *United States* v. *Cioffi*, 242 F. 2d 473, 476 (2d Cir. 1957); *United States* v. *Sherman*, 171 F. 2d 619, 624 (2d Cir. 1948).

Furthermore, even if an objection at this point is proper, the Federal cases hold very clearly that the doctrine of *falsus in uno, falsus in omnibus*, may be properly invoked whether or not the lies relate to a "material fact". See *United States* v. *Rutkin*, 189 F. 2d 431, 439 (3d Cir. 1951), *aff'd* 343 U. S. 130, *rehearing denied* 343 U. S. 952 (1952); *Virginia Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405-6 (4th Cir. 1948) (and cases cited therein.)

Professor Wigmore agrees with the Federal authorities, stating in Section 1014 of his treatise:

> "It is commonly said that the falsehood must be

upon a *material* point. No doubt the Courts have here been led away by the inapt analogy of the limitations upon the criminal law of prejury. In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less a call to distrust the former than the latter" (3 Wigmore on Evidence (3d Ed. 1940)).

Accordingly, we submit, the Trial Court's charge on this point was entirely correct.

Conclusion

Appellants' guilt was established by substantial evidence. No error was committed in the curtailing of the cross-examination regarding Berner; nor was error committed in calling Harell as a witness. The evidence negatived any suggestion of entrapment. Ogull's motion for a mistrial was properly denied. Evidence of Gernie's possession of the marked $100 bill was properly admitted, and the jury correctly instructed. Accordingly the judgment of conviction should be affirmed.

Respectfully submitted,

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for the United States of America.

JEROME J. LONDIN,
ROBERT B. FISKE, JR.,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

Statement of Benjamin Harrell

Statement of Benjamin Harrell, Jr., taken on August 7, 1956, at the office of the Bureau of Narcotics, 90 Church Street, NYC, in the presence of Narcotic Agents George O'Connor, Anthony Zirilli, Don Miller and Jacques Changeux.

I, Benjamin Harrell, Jr., furnish the following statement of my own free will. I have not been threatened or promised any immunity. I have been advised that I may have counsel and do not have to give this statement.

On August 6, 1956, I rode in an automobile with Joseph Edwards to 67th Street between Central Park West and Columbus Ave., New York, New York. I got out of the car and walked into the office of a parking garage. I think it was the West 67th Street Garage. Joseph Edwards remained in the car at all times while in this area. When I entered the garage I saw "Joe" and a colored fellow. "Joe" walked into a doorway at the back of the office and I followed him through the door. "Joe" closed the door behind me, then reached over to a coat or sweater hanging on the wall. "Joe" then handed me three cellophane bags and said, "here, I'll see you tomorrow night". I said, o. k., see you tomarrow night. I then went into the toilet in the back of the garage and wrapped the three bags in toilet paper. I then returned to the car with Joseph Edwards and we drove to 102nd St. and East River Drive. Just as we left the car, we were stopped

by the officers. The officers also stopped Albert Mobley who had just walked up to the car. Mobley and I had made previous arrangements that if I were able to obtain any heroin, we were to get rid of it togeather. We were planning to sell it, but we were also planning to use any thing we could not sell.

I first met "Joe" about one week before my brother died on July 27, 1956. At that time, my brother, Douglas, drove me up the West 67th Street Garage. My brother walked into the garage. Shortly thereafter, "Joe" walked out of the garage and looked me over. "Joe" then said, "You Porkie's brother", to which I replied, "yes". "Joe" walked back into the garage. My brother returned to the car and we returned to 99th and Third Ave., where I left the car. Later on that night I received a small amount of heroin from my brother.

On August 2nd, 1956, I rode with Joseph Edwards to the 67th Street Garage. I left the car, walked into the garage and asked for "Joe". I was told by a garage attendant that he was not around. I then returned to the car and we drove around for about a half hour. We then returned to the garage on 67th St., and saw a young lighthaired fellow standing in the office. He said to me, "are you Porkie's brother?", to which I replied "yes". He then walked through the doorway in the back, and motioned for me to follow. He then closed the door and reached over to a coat or sweater hanging on the wall. He then handed me one cellophane bag, and said, "see you tomorrow night—be careful". I then returned to the car and drove back uptown.

Statement of Beniamin Harrell

I do not know "Joe's" last name, and I do not know any name of the lighthaired fellow. Joe is about 30-35 years old, about 5'11" to 6'1" in height, weighs between 180 to 185 lbs., black hair and wavy, smart dresser, no hat. The other fellow is about 23-26 years old, about 5'7"-5'8" in height, weights about 150 lbs., he has light hair and straight. "Joe" is probably Italian, but the other fellow looks more Irish than anything.

I have read the foregoing statement consisting of one (1) page, initialed errors and signed below in the presence of the above officers.

DONALD E. MILLER

BEN HARRELL

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No.

UNITED STATES OF AMERICA,

—v—

BENJAMIN HARRELL, JR. and JOSEPH EDWARDS,

Defendants.

The Grand Jury charges:

On or about the 6th day of August, 1956 in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards the defendants, unlawfully, wilfully and knowingly did receive, possess, conceal and facilitate the transportation and concealment of a narcotic drug; to wit, approximately 2½ ounces of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics may find necessary to provide for medical and legitimate uses only, is prohibited (Sections 173 and 174, Title 21, United States Code).

Jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid and United States Internal Revenue Stamps as required by Section 4703 of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a), and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, Joseph Edwards operated an automobile.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 2nd day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. rode in an automobile.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards rode in an automobile.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. and Joseph Edwards were in the vicinity of 67th Street and Columbus Avenue, New York, N. Y.

5. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 6th day of August, 1956, in the Southern District of New York, Benjamin Harrell, Jr. received approximately 2½ ounces of heroin. (Title 18, United States Code, Section 371.)

.....

Foreman

PAUL W. WILLIAMS
United States Attorney